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August 8, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, NW. Room 222
Washington, DC 20554

Re: Ex Parte - CC Docket 97-137/ Application by Ameritech Michigan for Authorization Under Section 271 of the Communications Act to Provide in Region InterLATA Service in the State of Michigan.

Dear Mr. Caton:

The enclosed material is being filed today for inclusion in the above referenced proceeding.

Two copies of this Notice are being submitted to the Secretary of the Federal Communications Commission in accordance with Section 1.1206(a)(1).

Sincerely,

Betsy J. Brady

Enclosure

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Re: The Commission's Duty to Apply Its Interpretations Of §§ 251(c) & 252(d) In § 271 Proceedings, Despite The 8th Circuit's Decision.

In its recent decision, the Eighth Circuit vacated the Commission's pricing rules on jurisdictional grounds and vacated some aspects of the Commission's unbundling and other non-pricing rules on other grounds. This memorandum explains why the Eighth Circuit's decision will have no effect on the Commission's authority (and duty) to apply its interpretations of the requirements of Section 251(c) and 252(d) in deciding the applications for interLATA authority filed by Ameritech-Michigan or other BOCs under Section 271 of the Act.

As explained below, the Eighth Circuit's decision only addressed the Commission's jurisdiction to adopt rules under § 251(d) that would bind states in conducting interconnection arbitrations under § 252 of the Act. The decision has no effect on the Commission's authority to apply its view of the Act in exercising its explicit jurisdiction under the separate provision of § 271 of the Act to adjudicate whether individual BOCs have satisfied the prerequisites to interLATA authority. Indeed, Section 271 prohibits the Commission from granting any application unless it determines that access and interconnection is being provided "in accord with the requirements of § 251(c) and § 252(d)" and that a grant of interLATA authority is otherwise in the public interest. Thus, the Commission has not only the right, but also the duty to apply its interpretation of these federal requirements in § 271 proceedings.

That is starkly so with respect to the Act's pricing standards, for the Eighth Circuit did not hold that the Commission's interpretation was substantively invalid. Rather, the Eighth Circuit vacated the rule solely on the ground that the FCC had been found to lack jurisdiction to adopt regulations that govern the determination that states make in the arbitrations that they conduct.

In addition, while the Eighth Circuit vacated other non-pricing rules on the ground that they were not authorized by the terms of § 251 and § 252, the Eighth Circuit's holdings on most of these points were exceedingly narrow. But even to the extent the Eighth Circuit adopted significantly different interpretations of the Act, they do not bind the Commission in carrying out its separate responsibilities under § 271, and decisions in § 271 proceedings can only be reviewed by the D.C. Circuit.

Pricing. The Eighth Circuit vacated the FCC's TELRIC and other pricing rules on a narrow jurisdictional ground. While the Court held that § 251 and § 252 "apply" to intrastate services, the rules had been adopted for the purpose of prescribing rules of decision in the arbitration proceedings over which state commissions have jurisdiction, and the Court held that § 251(d) (and §§ 4(i), 201(b), and 303(r)) do not unambiguously give the FCC "jurisdiction" to adopt substantive pricing standards that would bind states in conducting these proceedings and overcome the "fence" of § 2(b). The court also relied on the fact that while § 252(c)(1) requires states to comply with FCC regulations in conducting arbitrations, § 252(c)(2) provides that the states are to establish rates based on the standards of § 252(d), and neither § 252(c) nor § 252(d) make any mention of FCC regulations.

For this reason, the Eighth Circuit thought Congress had not unambiguously given the FCC jurisdiction to adopt pricing rules that bind states, but could have intended that states conclude arbitrations on the basis of their own interpretations of the federal pricing

requirements of § 252(d) and § 251(c). Under the Eighth Circuit's view, the only entities with authority to assure that states apply the interpretation of the federal pricing requirements that best effectuate their terms and purposes are the federal courts that review the agreements under § 252(e)(6). Thus, if states do not follow the Commission's interpretation of the Act's pricing requirements, their decisions will be appealed to the appropriate federal district court, and then to the appropriate federal court of appeals, and ultimately to the United States Supreme Court -- and it is then and only then that there can be a single definitive national interpretation of the Act's pricing requirements.

In the interim, the Eighth Circuit's holding has no effect on the Commission's authority to enforce its view of § 251's and § 252's pricing requirements in the proceedings in which the Commission unquestionably has jurisdiction to enforce these federal requirements. For example, if a state were ever to decline to conduct arbitrations, the Commission would have to act as the arbitrator under § 252(e)(5), and there is no doubt that the Commission would then apply its interpretation of the requirements of § 251(c) and § 252(d). In particular, while the Commission's rules were vacated on procedural grounds, decisionmakers still have to apply the best available interpretation of the Act's pricing requirements in conducting adjudications.

Similarly, § 271 is another express grant of jurisdiction to the Commission that explicitly requires it to conduct adjudications to determine whether the BOC is in compliance with the pricing and other standards of § 251(c)(1) and § 252(d). Specifically, under § 271, a BOC cannot obtain long distance authority unless the Commission finds that the BOC is, inter alia, providing (1) "interconnection in accordance with the requirements of § 251(c)(2) and § 252(d)(1)" (§ 271(c)(2)(B)(i)); (2) access to unbundled network elements "in accordance with the requirements of § 251(c)(3) and § 252(d)(1)" (§ 271(c)(2)(B)(ii)); and (3) resale "in accordance with the requirements of § 251(c)(4) and § 252(d)(3)" (§ 271(c)(2)(B)(xiv)). Accordingly, to conduct adjudications under § 271, the Commission must independently determine the meaning of the pricing requirements of § 251(c) and 252(d) and determine whether a BOC is now pricing, and will hereafter price, interconnections, access, and wholesale services for resale in accord with those requirements. Thus, while the pricing rules have been vacated on procedural grounds, the Commission's interpretations of the Act's pricing requirements must be applied in § 271 proceedings unless and until the Commission changes its interpretation or that interpretation were definitively held to be invalid.

These points have previously been recognized by the Commission and the BOCs. For example, the Commission has previously advised the Supreme Court and numerous federal district courts that even if the Commission's regulations were found not to bind states in arbitrations, the Commission would, for the reasons discussed above, still apply these interpretations in § 271 proceedings (as well as any § 252(e)(5) proceedings). It stated that Section 271 "requires the FCC, when considering [BOC] applications [to enter the long distance business] to determine what constitutes compliance with Section 251(c)(2) and 251(c)(3)" and that Section 271 provides the Commission with an "independent" source of authority to apply its interpretations of the Act's pricing requirements.[1]

[1] Application To Vacate Stay, p. 30, FCC v. Iowa Utilities Bd., No. A-299 (U.S. S. Ct., filed October 24, 1996); Reply Brief for the Federal Applicants, pp. 11-12, FCC v. Iowa Utilities

Ironically, the BOCs previously made the same points to the Eighth Circuit when they argued that the Court should address the substantive challenges to the pricing rules even if the Court held that the Commission lacked authority to adopt them. In particular, the BOCs argued that the "FCC has repeatedly made clear that, even if it loses on the jurisdictional issues, it will nevertheless attempt to apply its pricing rules through other means -- including its asserted authority under section 208 to adjudicate complaints, its authority to approve RBOC entry into interexchange services under section 271, and its authority under section 252(e)(5) to take the place of a State commission that fails to act under section 252."[2] And the BOCs went on to quote the Commission's statements to the Supreme Court that it would have to determine compliance with the pricing standards of Sections 251(c) and 252(d) in ruling on § 271 applications.[3]

The Eighth Circuit "cho[se] not to review these [pricing] rules on the merits" (Slip op at 113-14), and it went on to accept the states and the mid-sized LECs' claim that the Commission could not use § 208 authority to review or enforce interconnection agreements. Slip Op. at 120-23. However, the Eighth Circuit did not disagree that the Commission would and should apply those standards both in any § 252(e)(5) proceedings that it conducts in the future and in the proceedings under § 271. The Eighth Circuit recognized that the local competition rules that were before it were adopted for the sole purpose of establishing standards that would apply to state arbitrations. Having held that the Commission rules cannot bind the states in arbitrations, there was no reason for that Court to address the permissibility of actions that the Commission would take in proceedings that all conceded were within the Commission's jurisdiction, particularly because decisions in § 271 proceedings are reviewable only in another court (the D.C. Circuit). See 47 U.S.C. § 402(b)(9).

Since the Eighth Circuit's ruling, at least one BOC (SBC) has attempted to renounce their earlier claims and to contend that the Commission cannot apply its interpretations of the pricing requirements of § 251 and § 252 in conducting adjudications under § 271. SBC now maintains that the Commission is somehow bound to accept the lawfulness of any determination that is made in the state arbitration (at least if it is upheld in federal district court), and that there otherwise would be two rates -- one applicable to arbitrations and a second applicable to § 271 proceedings. This claim is frivolous. Insofar as the Commission is making determinations whether access and interconnection is provided in accordance with the requirements of § 251 and § 252, it would be determining the meaning of a federal statutory terms that will, eventually, be given a single definitive national interpretation that best effectuates the Act's terms and purposes. But under the Eighth Circuit's holding, that single interpretation

(..continued)

Bd., No. A-299 (U.S. S. Ct., filed October 30, 1996); Memorandum of FCC as Amicus Curiae, pp. 11-12, Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc., A-97-CA-132-SS (U.S.D.C., W.D. Tex., filed June 19, 1997).

[2] Reply Brief For Petitioners Regional Bell Companies And GTE, p. 31 (8th Circuit, Jan. 6, 1997).

[3] Id. at 32.

will result only after multiple state commissions and the Commission exercise their separate jurisdictions under § 252(c), § 252(e)(5), § 271. In the interim, there is no more basis for the Commission to defer to the states than there is for the states to defer to the Commission.

Moreover, that would still be the case even if one were to read the Eighth Circuit's decision as holding that there will, and permissibly can, be multiple different interpretations of the Act's pricing requirements coexisting indefinitely -- i.e., that Congress contemplated that the same provisions of the Act would permanently be subject to varying interpretations in different States. Indeed, if these statutory provisions may permissibly be interpreted in inconsistent ways by different authorities as long as each authority is acting within its respective jurisdiction, then the FCC is likewise authorized and required to apply its own interpretation of those provisions in acting within its undisputed sphere and determining whether to grant a BOC's application for long-distance entry under Section 271.

In that regard, the Act expressly declines to require the Commission to give any deference to the state's determinations when the FCC conducts its adjudication under § 271. Compare § 271(d)(2)(A) (requiring substantial weight to Department of Justice's recommendation) with § 271(d)(2)(B) (requiring no specified weight to state determination). The Commission is directed to "consult" with the State Commission "in order to verify the compliance" of the BOC with the competitive checklist, see 47 U.S.C. § 271(d)(2)(B), but, as that language makes clear, the responsibility to "verify the compliance" is assigned to the FCC, not to the State Commissions with which it consults prior to discharging that responsibility. Indeed, the Commission also has the authority under Section 271(d)(6) to revoke a BOC's long-distance authority after such authority has been granted if it determines that the BOC has ceased to meet any of the required conditions, including the checklist, and there is no provision for consultation with State Commissions in proceedings under Section 271(d)(6).

All these features of § 271 simply reflect the reality that the Commission is not performing the state's function of determining rates for interconnection, access, and resale, or the federal district court's function of reviewing approved interconnection agreements, when it acts upon a Section 271 application. Rather, the Commission is doing something else -- determining if the preconditions for removal of the long distance restriction have been satisfied -- and there is no basis for the Commission to defer to other bodies in making this determination. At the same time, if the result of the denial of a § 271 application were the adoption of rates that better advance the Act's goals of fostering competition, that would promote the Act's fundamental objectives, not retard them. Indeed, that is one of the reasons that the Act requires that there be a Commission determination of compliance with the competitive checklist before there can be long distance authority.

Finally, the Act gives the Commission the authority (on public interest grounds) to deny applications even when the other prerequisites are satisfied. That underscores that there is no substance to any claim that the Commission should defer to other bodies' determination that the rates satisfy the requirements of the Act for any purpose.

Non-pricing Rules. The Eighth Circuit also vacated some of the Commission's non-pricing rules: the "pick and choose" rule and some subsections or aspects of the unbundling

rules. These holdings, however, were very narrow, and AT&T does not believe that they could have any substantial effect on the evaluation of any application under § 271. In particular, while the rules were vacated, the Commission is still required to determine whether the BOC is providing access and interconnection in accordance with the requirements of § 251(c) and § 252(d), and there appears to be little practical difference between the Eighth Circuit's interpretation and those that underlie the Commission rules that were vacated.

For example, while the Eighth Circuit vacated the "pick and choose" rule, it did so on the ground that it was not, in the court's view, based on a permissible interpretation of § 252(i), which was only held to entitle new firms to subscribe to prior agreements in their entireties. However, the Commission will still have to determine whether access and interconnection are being provided on "nondiscriminatory" terms, as required by Section 251(c), and it is difficult to see how a BOC could be in compliance with this requirement if it were not acting in accord with the substance of the now-vacated pick and choose rule. This is particularly the case if none of the individual interconnection agreements negotiated by the BOC includes all of the checklist items, and the BOC is instead relying on a combination of agreements to satisfy the checklist.

Similarly, while the Eighth Circuit upheld Rule 315(b) and its prohibition on the disaggregation of unbundled elements that are currently combined within the LEC networks, the Eighth Circuit vacated Rules 315(c) through (f). These subsections unconditionally required the LEC to perform the functions required to create new combinations of network elements that are different than those currently available in the LEC networks. However, that latter holding rested on narrow grounds. In particular, the Commission imposed this unconditional duty on the LECs because it found that it would be impossible for the LECs to provide the access and technical information that CLECs would need to create these new combinations themselves, and the Court vacated the rule only on the ground that the LEC should be given the choice of either doing what is impossible or doing the combining itself. Because no BOC is likely to do the impossible, the substance of even the vacated unbundling rules is certain to be applied in the § 271 proceedings.

At any rate, the Eighth Circuit's substantive holdings under section 251 do not bind the Commission in conducting § 271 proceedings. These are separate adjudications that are performed for a different purpose, and findings of compliance with § 251 is only one component of an inquiry that ultimately requires a broad public interest finding. Determinations in § 271 proceedings also cannot be reviewed in the Eighth Circuit, for orders in such cases can be appealed only to the D.C. Circuit. 47 U.S.C. § 402(b)(9). Accordingly, if the Eighth Circuit's rejection of the Commission substantive interpretation of § 251's requirements were ever to have practical significance in a § 271 proceeding, this would epitomize the situations in which an agency is entitled to decline to acquiesce in one circuit's decision for the purpose of obtaining the ruling of another court of appeals.[4] The Commission would merely explain in its order why following the Eighth Circuit's interpretation of § 251(c)'s requirements would produce bad results on the facts of a particular case and that it is following a different interpretation.

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[4] See AT&T v. FCC, 978 F.2d 727, 737 (D.C. Cir. 1992) (the FCC has the "right to refuse to acquiesce in one (or more) court of appeals' interpretations of its statute").

Re: Combinations Of Network Elements After The Eighth Circuit's Decision

One question raised by the Eighth Circuit's recent decision in Iowa Util. Bd. v. FCC is whether and to what extent it will adversely affect the ability of CLECs to use combinations of network elements. The answer is that the decision can potentially have these effects only when CLECs are seeking to use new combinations of elements that are not currently available in an ILEC's network. Conversely, the decision should not have any effect on a CLEC's right to obtain access to existing combinations of network elements on the same terms and conditions as the ILEC enjoys.

In particular, the Eighth Circuit vacated only the FCC rules (47 C.F.R. §§ 51.315(c)-(f)) that unconditionally required ILECs to provision CLEC requests that the ILECs create entirely new combinations of elements, and even this decision rested on a very narrow ground under the Eighth Circuit's and the FCC's interpretation of the second sentence of § 251(c)(3). By contrast, the Eighth Circuit upheld the separate FCC rule that requires ILECs to provide access to existing combinations of network elements without separating them (47 C.F.R. § 51.315(b)) and the Eighth Circuit also upheld a host of other rules that give CLECs the right to obtain access to combinations of network elements on the same terms as the ILEC enjoys. E.g. id., § 51.313(b). Indeed, it would be blatantly discriminatory and unjust and unreasonable if ILECs were to disassemble existing combinations of elements only when CLECs requested them and thereby to require CLECs alone to incur the delays, inconvenience, and expense of recreating combinations that already exist. The only purpose of such a requirement would be to impede the CLECs' efforts to compete.

In this regard, ILECs did not even argue to the Eighth Circuit that the Act gave them the right to engage in such conduct. In all events, two separate provisions of § 251 authorize the FCC regulations that prohibit that anticompetitive conduct.

First, 47 C.F.R. § 51.315(b) and other parallel FCC regulations are authorized by the Eighth Circuit's interpretation of the second sentence of § 251(c)(3). The Eighth Circuit agreed with the Commission that this second sentence requires the ILEC to provide network elements in a manner that reasonably enables CLECs to do whatever combining is required to provide a telecommunications service. When elements are currently combined, no conduct by the LEC is necessary to discharge this duty and the ILEC would breach it if the LEC disassembled elements that have been ordered in combination.

Second, these rules are independently authorized by the separate requirement of the first sentence of § 251(c)(3) that LECs provide "nondiscriminatory" access to network elements "on an unbundled basis" and on "terms and conditions" that are "just, reasonable, and nondiscriminatory." As the Commission has repeatedly held in the past and as the local competition rules provide, the duty to provide access to elements on an unbundled basis means only that the ILEC must have a separately stated price for each element and provide customers the option of not purchasing particular elements. Correlatively, if a CLEC seeks to use the same combinations of elements that the ILEC currently uses, it is discriminatory and unjust and unreasonable for the ILEC to break the elements apart and make the CLEC recombine them.

1. The Eighth Circuit Vacated Only Those Unbundling Rules That Required ILECs To Create New Network Capabilities For CLECs.

In the Eighth Circuit, the ILEC petitioners did not even contend that the Act authorized them to deny CLECs access to existing combinations of network elements by breaking them apart and making the CLECs reassemble them. Rather, the only argument that they directly made was that the Commission's rules were invalid insofar as they required the ILECs to develop new network capabilities for CLECs. In particular, while conceding that they could be forced to take the steps necessary to give CLECs "equal" access to the incumbents' facilities, the ILECs objected to both Rule 51.315 and the separate rules that required ILECs to grant requests for superior access and interconnection on the ground that these provisions "forced" ILECs to act as "laborers" for CLECs. See GTE/BOC Br., pp. 60-62.

The Eighth Circuit expressly upheld the Commission rules that require ILECs to make the modifications to their networks necessary to provide equal access. Slip Op. at 140 n.33. The Eighth Circuit vacated only those unbundling rules that required ILECs to do the work necessary to create new network capabilities for CLECs. It vacated the rules requiring superior interconnection and access on the ground that the first sentence of § 251(c)(3) required only that the LEC provide access that is "equal" to what the LEC enjoys. Id. at 139-40.

And the Eighth Circuit similarly vacated only subsections (c)-(f) of Rule 51.315, which required, when technically feasible, the creation of new combinations of network elements that do not currently exist in ILEC networks. Specifically, upon a CLEC's request, these rules required ILECs both to combine their network elements with those of CLECs and to combine network elements within ILEC networks in new ways that do not currently exist.

In vacating these subsections, the Eighth Circuit recognized that the second sentence of § 251(c)(3) imposes a duty on ILECs that is in addition to the duty to provide nondiscriminatory access. In particular, it requires ILECs to provide this nondiscriminatory access "in a manner that allows the [CLEC] to combine the network elements in order to provide a telecommunications service." The FCC had justified subsections (c) through (f) on the ground that this statutory language required CLECs to do the actual combining only when it was reasonably possible for them to do so and the FCC found that it would be impossible for the ILEC to provide the physical access to network facilities and the technical information that CLECs would require to create new combinations of elements. Local Competition Order, ¶¶ 293-94. And the appellate briefs of the FCC and its supporting intervenors ridiculed the notion that ILECs would let CLECs work on the incumbent networks with screwdrivers.

While it vacated subsections (c)-(f) of Rule 315, the Eighth Circuit did not reject the FCC's conclusion that the ILECs can be required to create the new combinations in conditions in which it is not reasonably possible for the CLEC to do so. Nor did it reject the FCC's finding that it was generally impossible for ILECs to provide the necessary access and information. Rather, the Eighth Circuit concluded that "the fact that the incumbent LECs object to the rule indicates to us that they would rather allow entrants access to their networks" than "to do all of the work" themselves. Slip Op. at 141 (emphasis added).[1] Thus, the Eighth Circuit's holding is only that subsections (c)

[1] In these regards, the Eighth Circuit rejected the ILECs' claim that they never could be obligated to do the work required to create the combinations and that their sole duty was not to take

through (f) are overbroad in that they require incumbents to do the combining even in those circumstances in which CLECs are given the necessary information and physical access.

Accordingly, the FCC can, consistent with the Eighth Circuit's holding, take the position that Section 251(c)(3)'s second sentence requires ILECs to create new combinations of elements except in those circumstances in which CLECs are given the necessary physical access to the LEC facilities and the technical information necessary to do the combining. The FCC can and should now regard this as a requirement of § 251(c) when it rules on § 271 applications. Similarly, after the Eighth Circuit issues its mandate, the FCC could issue a new rule that explicitly so provides.

2. The Eighth Circuit Upheld The Regulations That Require Equal Access To Existing Combinations, And The First Sentence Of § 251(c)(3) Independently Requires ILECs To Provide CLECs With All Combinations Of Elements That Are Available Within Each ILEC's Network.

The narrow holding that invalidated subsections (c) through (f) has no effect on the separate FCC regulations designed to give CLECs equal access to the combinations of network elements that currently exist within ILEC networks. Indeed, in addition to its express holding that ILECs can be required to take the steps required to assure equality of access (slip op at 140 n. 33), the Eighth Circuit affirmed a host of regulations that give CLECs the right to use existing combinations of network elements on the same terms as the ILEC enjoys.

Most pertinently, the Eighth Circuit did not vacate the provisions of 47 C.F.R. § 51.315(b), which states that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." See also id., § 51.307(b); Local Competition, ¶ 324 (CLEC can choose to obtain access at one point to combinations of multiple unbundled elements that are physically connected to one another). In addition, the Eighth Circuit did not vacate a host of other regulations that require ILECs to provide CLECs with access to combinations of network elements on the same terms and conditions as the ILEC enjoys. 47 C.F.R. § 51.313(b); see id. § 51.309(a). Nor did the FCC vacate the FCC regulations that define individual network elements to include connections to adjacent elements[2] and that specifically provide that purchasers of certain elements automatically receive access to separate adjacent elements.[3]

These regulations assure that CLECs can obtain equal access to the combinations of network elements that exist within the incumbent LECs' networks. Notably, each regulation is

(..continued)
affirmative steps to prevent CLECs from creating the combinations. See Petitioners Br. of GTE and the RBOCs, pp. 60-62.

[2] See 47 C.F.R. § 51.319(a), (c), (d).

[3] See 47 C.F.R. § 51.319(e)(1)(ii) ("When a requesting telecommunications carrier purchases unbundled switching capability from an incumbent LEC, the incumbent LEC shall provide access to its signaling network from the switch in the same manner in which it obtains such access itself"); id. § 51.319(e)(2)(iii) (switch purchaser's access to call-related databases). Similarly, the Eighth Circuit specifically upheld the regulation that CLECs are entitled to obtain access to other network elements through their access to the OSS network element. Slip op at 130-34.

independently required by both the second sentence of § 251(c)(3) and its first sentence.

First, in declining to vacate Rule 315(b) and the other parallel regulations, the Eighth Circuit necessarily recognized that they impose duties that are different in kind from the provisions of §§ 51.315 (c)-(f) that the Court vacated on the basis of its interpretation of the second sentence of § 251(c)(3) of the Act. The Eighth Circuit recognized that the second sentence, at a minimum, imposes a duty on ILECs to take the steps necessary to enable CLECs to create new combinations of network elements. When the CLEC is ordering network elements that are currently combined, no affirmative steps are required for the ILEC to discharge this duty, and the Act surely requires the ILEC to refrain from engaging in sabotage by disassembling the very combinations that the CLEC has requested.

Second, quite apart from the second sentence of § 251(c)(3), the first sentence of this section imposes a duty on the ILEC to afford "nondiscriminatory access to network elements on an unbundled basis" and on "terms and conditions" that are "just, reasonable, and nondiscriminatory." The Eighth Circuit elsewhere recognized in its opinion that this duty requires the incumbents to take whatever steps are required to allow CLECs to obtain access to network elements that is "equal" to that which the ILEC enjoys -- such that the ILEC is prohibited from taking steps that would prevent the CLEC from obtaining access on terms that are just, reasonable, and nondiscriminatory.

For an incumbent to disassemble the combinations of elements that a new entrant orders and require the new entrant to incur the delay, expense, and inconvenience of recombining them epitomizes conduct that violates this duty. First, it is patently discriminatory. The incumbent LEC is able to use the network elements in combined form and does not have to take them apart and reassemble them when it provides service to a new customer. Similarly, the conduct is also unjust and unreasonable, for it serves no conceivable legitimate purpose. That is because the rates that the CLEC pays will include the full cost of creating the combinations, and the sole purpose and effect of the disassembly and reassembly that the ILECs want to require is to raise their rivals' costs and impede their ability to compete effectively.

In these regards, the first sentence of Section 251(c)(3) imposes a duty on ILECs to provide whatever combinations of network facilities are currently used in providing service to their customers, even if the ILEC would have to establish some physical connections in some situations (e.g. when the CLEC acquires a customer who just moved to the area and currently has no local service). Because the ILEC would create the necessary connections among elements if it were selected to serve the customer, its duty of nondiscrimination requires that it provide the elements in combined form to the CLEC. By contrast, under the Eighth Circuit's holding, the only situation in which an ILEC can decline to create the requested combinations is when they do not exist anywhere in its network and when the ILEC would thus be creating superior network capabilities for the benefit of a CLEC.

Finally, while no such claim was made to the Eighth Circuit, the ILECs have sought to justify this blatant discrimination on a different ground in some of the federal court appeals that they have filed from state arbitration decisions under § 252(e)(6) of the Act. In particular, they have suggested that the duty to provide network elements "on an unbundled basis" requires that they physically separate the network elements from one another before they are provided to a CLEC.

This claim is frivolous. "Unbundled" does not mean "physically separated." On the contrary, the dictionary defines "unbundle" as "to give separate prices for equipment and supporting

services; to price separately."[4] Indeed, when Congress used the term "unbundled" in § 251(c)(3), it acted against the background of literally decades of FCC and state regulatory decisions that used the term precisely this way. In particular, when these decisions directed a carrier to provide a component of service on an unbundled basis, they made it explicit that the carrier's duty was simply to state a separate price for the element and give consumers the option of declining to purchase the element from that carrier and obtaining it from another source. By contrast, when the consumer declines this option and chooses to continue to receive the element from the carrier, the carrier will charge the prescribed unbundled rate for the element and the carrier is neither required nor permitted to disassemble the element from the rest of its network and make the consumer incur the inconvenience, delay, and expense of recreating the combinations that previously existed.

That was the rule when the FCC previously ordered the provision on an unbundled basis of customer premises equipment,[5] of inside wire,[6] of features used to provide enhanced services,[7] of dedicated and switched transport,[8] and of tandem switching.[9] That was also the meaning of "unbundling" in the state commission proceedings in Illinois and New York which preceded the enactment of the 1996 Act and which ordered, or considered ordering, the unbundling of loops, ports, or other network elements.[10] The purpose of unbundling is to provide separate rates and choices for users, not to create inefficiencies for purchasers of the elements that are unbundled.

Accordingly, local competition regulations that no LEC even challenged before the Eighth Circuit defines unbundling in precisely this way. 47 C.F.R. § 307(d); see also Local Competition NPRM, ¶ 86. That is also why the Commission regulations that were adopted to implement the first sentence of § 251(c)(3) all require ILECs to provide access to network elements

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[4] Webster's New Collegiate Dictionary (Merriam, 1981) (emphases added).

[5] Second Computer Inquiry, 77 F.C.C.2d 384, 388, 443-44 (referring to unbundling as a "pricing practice"); Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

[6] Second Report and Order, Detariffing the Installation and Maintenance of Inside Wiring, 59 Rad. Reg.2d 1143, 1151-53 (1986); NARUC v. FCC, 880 F.2d 422 (D.C. Cir. 1989).

[7] Third Computer Inquiry, 104 F.C.C.2d 958, 1064-66 (1986) ("unbundling" means that "competitors will pay only for Basic Service Elements that they use"); California v. FCC, 905 FCC.2d 1217 (9th cir. 1990); California v. FCC, 4 F.3d 1505 (9th Cir. 1991); California v. FCC, 39 F.3d 919 (9th Cir. 1994).

[8] Report and Order and Notice of Proposed Rulemaking, Expanded Interconnection with Local Telephone Company Facilities,, 7 FCC Rcd 7369 (1992) ("Special Access Expanded Interconnection Order"); Second Report and Order and Third Notice of Proposed Rulemaking, Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd 7374 (1993) ("Switched Transport Expanded Interconnection Order").

[9] See Switched Transport Expanded Interconnection Order, supra n.7.

[10] Order Considering Loop Resale and Links and Ports Pricing, Case Nos. 95-C-0657, 94-C-0095, and 91-C-1174 (NYPSC Feb. 1, 1996); Ill. Comm. Comm'n Docket Nos. 95-0458, 95-0531.

on the same terms and conditions as the ILEC enjoys (47 C.F.R. § 313(b)) and also specifically provide that CLECs may obtain access to multiple network elements that are connected to one another at a single point of access. 47 C.F.R. § 307(b); Local Competition Order, ¶ 324.

In sum, there is no question about the lawfulness of 47 C.F.R. § 51.315(b) and the other provisions of the Commission's regulations that require incumbent LECs to give CLECs access to the combinations of network elements that currently exist within the ILEC network. These regulations reflect both the requirements of the first sentence of § 251(c)(3) and those of its second sentence.